UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

NOAH'S ARK PROCESSORS, LLC D/B/A WR RESERVE	)	
Respondent	)	
and	)	Case No. 14-CA-255658
UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 293	)	
Charging Party	)	

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 293's BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

Since approximately 2011, United Food and Commercial Workers Local Union No. 293 (hereinafter "the Union") has been recognized as the exclusive bargaining representative for a unit of employees employed by Noah's Ark Processors, LLC, d/b/a WR Reserve (hereinafter "Respondent") at its facility in Hastings, Nebraska. (G.C. Ex. 1-E §§ 2-5; Joint Ex. 33 § 2). Respondent is engaged in the slaughter, processing, packaging, and non-retail sale of meat products. (Joint Ex. 33 §§ 1-2). The unit includes all production, maintenance, shag drivers, and distribution employees. The most recent collective bargaining agreement ("CBA" or "agreement") had a term of January 28, 2013 through January 28, 2018. (Joint Ex. 2; Joint Ex. 33 § 2).

This matter involves violations that occurred following expiration of the agreement. Specifically, the instant proceeding concerns Respondent's behavior from August 5, 2019 through January 24, 2020. (G.C. Ex. 1-E § 6). Even before August 5, 2019, however, Respondent consistently failed to bargain in good faith with the Union. The Board's recent decision in Case 14-CA-217400 concerning this Respondent's conduct during earlier periods of bargaining demonstrates that Respondent's conduct in the instant matter is part of a pattern of unlawful behavior that Respondent has engaged in since the contract expired over three years ago. (Joint Ex. 1; Joint Ex. 7; *Noah's Ark Processors, LLC d/b/a WR Reserve,* 370 NLRB No. 74 (January 27, 2021) (affirming ALJ's ruling that Respondent violated Section 8(a)(5) by failing to bargain in good faith with the Union)).

Despite continued admonishment from the Board and courts, Respondent nevertheless has continued its pattern of bad faith bargaining. As demonstrated by the evidence presented at the hearing, and as explained below, Respondent has once again violated the Act by failing to bargain

in good faith with the Union and by making changes to terms and conditions of employment without first bargaining to an overall good faith impasse. (G.C. Ex. 1-E §§ 6-7).

II. STATEMENT OF THE CASE

On February 4, 2020, the Union filed the unfair labor practice charge which is the subject of this proceeding, asserting that Respondent violated Sections 8(a)(5) and (1) of the Act during the 10(b) period by failing to bargain in good faith with the Union and by unilaterally implementing terms and conditions of employment without first bargaining to an impasse (G.C. Ex. 1-A). A complaint issued on June 10, 2020. (G.C. Ex. 1-E). A hearing was held before the Honorable Administrative Law Judge Robert A. Ringler on December 15, 2020 and January 12, 2021.

III. STATEMENT OF ISSUES PRESENTED

The issue presented in this proceeding is whether Respondent violated Sections 8(a)(5) and (1) of the Act during the 10(b) period by failing to bargain in good faith with the Union and by implementing the last, best and final offer dated January 13, 2020, which included changes to mandatory subjects of bargaining, without bargaining to a good faith impasse. (G.C. Ex. 1-E § 7).

IV. STATEMENT OF FACTS

The facts in this case are largely undisputed[1] and almost entirely documented in the Exhibits. The Union's witnesses at the hearing included Brian Schwisow, Eric Reeder, and Rodney Brejcha, all of whom participated in negotiations with Respondent on behalf of the Union.

Notably, Respondent did not call any witnesses or introduce any exhibits at the hearing.

[1] General Counsel Exhibit 2 comprises the parties' Stipulated Facts and Joint Exhibit 33 comprises the parties' Stipulated Timeline.

a. First Period of Bargaining

The first period of bargaining between Respondent and the Union over a successor agreement occurred between March of 2018 and January of 2019. (G.C. Ex. 2). The parties met for a total of twenty sessions during which Respondent made two proposals, the first in May of 2018 and the second in January of 2019. (G.C. Ex. 2; Joint Ex. 3; Joint Ex. 4). Respondent identified the January 2, 2019 proposal (Joint Ex. 4) as its last, best, and final offer, and at the end of that month declared impasse and implemented that offer. (Joint Ex. 5; Joint Ex. 33 §§ 6-7).

In March of 2019, Administrative Law Judge Andrew Gollin presided over an unfair labor practice hearing based on a complaint issued by the General Counsel in Case 14-CA-217400. (Joint Ex. 33 § 9). The General Counsel's complaint alleged that Respondent violated the Act by, among other things, failing and refusing to provide information relevant to bargaining that the union initially requested in November of 2017, failing to bargain in good faith with the union for the successor agreement, engaging in conduct to undermine the Union as the employees' bargaining representative, and implementing the last, best and final offer dated January 2, 2019, which included changes to mandatory subjects of bargaining without bargaining to a good faith impasse. Shortly after the unfair labor practice hearing, the Regional Director's 10(j) petition was granted and an Injunctive Order issued on May 10, 2019. (Joint Ex. 8). Respondent was ordered to bargain in good faith on a schedule of no less than twenty-four (24) hours per month and to rescind any unlawful unilateral changes made by implementation of the final offer. (Joint Ex. 8).

b. Second Period of Bargaining

The parties returned to bargaining following the Injunctive Order. This time the parties met just three times: July 23, 2019, July 30, 2019, and August 6, 2019. (Joint Ex. 33 § 12). No

bargaining occurred on July 23rd as Respondent failed to provide requested information to the Union and Respondent's representatives left not long into the session. (Tr. 51-55; G.C. Ex. 3).

On July 30, 2019, Respondent offered the Union a new proposal identified as Joint Exhibit 14. (Joint Ex. 33 § 13). In its new proposal, Respondent sought to entirely remove seven (7) of the twenty-one (21) articles in the expired agreement (as set forth in Joint Ex. 2), six (6) of which it had not previously proposed removing. Most notably, Respondent proposed eliminating the final four steps of the grievance procedure found in Article 4 of the expired agreement. As proposed, the grievance procedure would consist of just one step in which the employer had the final say. (Tr. 60; Joint Ex. 14). Mr. Schwisow, who was present at the session, testified that he told Respondent the proposal "looked a lot worse than the one from January of '19." (Tr. 60 at 11-13). Respondent provided no response to this observation. Respondent offered no rationale for the proposed gutting of the grievance process. (Tr. 64 at 16). The Union told Respondent that "it's very important that the Union have arbitration in that grievance process." (Tr. 64 at 21-23).

The new proposal included other significant rescissions as well. With respect to Article 7 of the expired CBA, the safety provisions, the proposal was to eliminate the entire article. As Mr. Schwisow testified, the Respondent "wanted to exclude the Union from anything to do with safety…" (Tr. 60 at 23-25). Respondent's only explanation was that Respondent "do[es] not need the Union involved in that." (Tr. 65 at 3-4). With respect to Article 8 of the expired CBA, the vacation provisions, the Respondent proposed to remove most of the article. With respect to Article 9 of the expired CBA, Respondent proposed to remove all of the explanatory language concerning holiday pay. With respect to Article 21, Respondent proposed to remove entirely the right of the Union to visit the plant to investigate grievances or review operations. Respondent provided no reason for the proposed change. (Tr. 63 at 4). Respondent's proposal also sought to remove the

subcontracting article entirely, remove the seniority article entirely, remove the injury-on-the-job article entirely, and significantly change the dues checkoff provisions in order to permit an employee to terminate their dues at any time by contacting Respondent (not the Union). That same day, on July 30, 2019, the Union attempted to go through its proposals and make modifications, but Respondent provided no response and no bargaining occurred. (Tr. 63 at 12-16; Tr. 64 at 1-4).

On August 6, 2019, Respondent refused to negotiate over the proposal or the Union's proposed modifications. (Tr. 66 at 1-8). On that day, Respondent declared that the July 30, 2019 proposal (Joint Exhibit 14) was its last, best and final offer. (Tr. 66 at 10-16, 23; Joint Ex. 33 § 14). On September 16, 2019, Region 14 filed a Motion seeking that Respondent be found in contempt of the Injunctive Order. (Joint Ex. 33 § 15). On October 11, 2019, Judge Gollin issued his decision in the unfair labor practice case, finding, in relevant part, that Respondent had unlawfully failed to provide the information requested, failed to bargain in good faith with the union, and declared impasse and implemented its January 2, 2019 last, best and final offer without reaching good faith impasse. The Decision is set forth in Joint Exhibit 7.

On October 17, 2019, Respondent was held in contempt of the Injunctive Order and the Court issued a Sanctions and Purgation Order on November 1, 2019 requiring that Respondent bargain in good faith with the Union for no less than twenty-four (24) hours a month in November and December of 2019 and January 2020. (Joint Ex. 10). The Order required Respondent to continue with that same schedule in three month increments until the parties executed an agreement or reached good faith impasse. (Joint Ex. 10).

c. Third Period of Bargaining

On November 5, 2019, Mr. Pigsley e-mailed Mr. Zarate providing Respondent's availability for bargaining sessions to occur in November, December, and January. (Joint Ex. 15).

With the exception of the first two dates in November, Respondent proposed a 9:00 a.m. start time for the sessions. (Joint Ex. 15). The parties met on November 11th, 18th, and 26th; December 9th, 10th and 17th; and January 13th. (Joint Ex. 33 § 20). As explained below, Respondent failed to show for a session scheduled for November 21st. (Tr. 130 at 1-9). Respondent drafted bargaining summaries for each of the sessions which are set forth as Joint Exhibits 26 through 32. The parties stipulated that these bargaining summaries were prepared solely by Respondent. The accuracy of the content of these bargaining summaries is disputed. The author of the bargaining summaries, Respondent's attorney Jerry Pigsley, provided no testimony.

The parties met on November 11, 2019 as scheduled. (Joint Ex. 33 § 20). Eric Reeder, April Guerrero, Rodney Brejcha, and Carmen Perez were present for the Union. (Joint Ex. 33 § 20). Respondent's attorney, Jerry Pigsley, and Fischel Ziegelheim were present for Respondent. (Joint Ex. 33 § 20). The bargaining summary prepared by Respondent for the session is set forth in Joint Exhibit 26. The proposal Respondent presented to the Union that day is marked Joint Exhibit 26-C therein. The Union's proposals are marked as Joint Exhibit 26-D and Joint Exhibit 26-E. The Union also presented Respondent with an Extension Agreement which Respondent refused to sign. (Joint Ex. 26-B). This document was part of the compliance process following the Order to rescind all unilateral changes that had been made unlawfully (Tr. 87 at 21-24).[2] Among the topics that were discussed on November 11, 2019 were the grievance procedure, dues checkoff, safety, seniority, and vacation. (Tr. 91 at 1-2).

Respondent's Proposal 3 in Joint Exhibit 26-C refers to Article 4 of the expired CBA (Joint Ex. 2), which is the grievance procedure. Compared to the expired agreement, Respondent's

[2] Respondent continued to refuse to sign the agreement even after being asked to do so during future negotiations. (Tr. 88 at 21-25; Tr. 89 at 1-7).

proposal would eliminate every step of the grievance process other than the first step. The first step comprises the employee simply presenting the grievance to the supervisor. (Tr. 92 at 6-8; Joint Ex. 2). According to Mr. Reeder, elimination of all the steps but first would mean that Respondent "would have the final say." (Tr. 92 at 11). The Union asked Respondent why Respondent wanted to get rid of the procedure and what if any problems existed with the existing grievance process. (Tr. 92 at 15-17). Respondent responded, according to Mr. Reeder, "that the procedure was long, kind of drawn out." (Tr. 92 at 20-21). The Union indicated that it would attempt to address this concern with "something that might be easier for them, a little more concise…" (Tr. 93 at 7-8).

The Union's counter proposal specifically concerning the grievance process is set forth in Joint Ex. 26-E. The proposal comprises a trimmed down process whereby if a grievance is not settled at the supervisor level, it goes to HR, then to arbitration if not settled. (Tr. 94 at 4-14). After explaining this streamlined process, Respondent indicated "they were not interested" in it. (Tr. 94 at 22). Respondent offered scant reasoning other than Respondent had concerns about costs and bringing in an outside arbitrator. (Tr. 94 at 14-17). The Union attempted to explain that when an FMCS panel is requested for arbitration it can be narrowly tailored to a specific geographical scope, but Respondent indicated it was not interested. (Tr. 96 at 1-6). When Respondent shifted its justification for opposing arbitration to costs, the Union even offered a counter proposal later on to have the losing party pay all costs of arbitration. (Tr. 96 at 15-17; Joint Ex. 28 at p. 2). Ultimately, despite the Union's counter proposals addressing Respondent's shifting concerns about arbitration, Respondent made clear that it simply "didn't want an arbitration process in there at all." (Tr. 97 at 8). Respondent refused to change its position. (Tr. 99 at 6-9). The Union did not agree to removal of the grievance procedure. (Tr. 99 at 10-12).

Another proposal included removing Article 12, the rates of pay provision. It specifically reads, "Delete Article 12. Rates of pay will remain unchanged. Union recognizes management's right to increase pay without the agreement of the Union." (Joint Ex. 26-C). In other words, Respondent proposed that the Union waive its right to bargaining over pay increases, a mandatory subject of bargaining. Another one of the Respondent's proposals included in Joint Ex. 26-C proposed changes to Article 2, which is the dues check off provision. The expired agreement (Joint Ex. 2) contained traditional dues check off language whereby the employer will withhold dues *as the employee as authorized in writing*. Respondent's proposal would allow an employee to simply contact Respondent's HR department at any time to cease having dues withheld without having to contact the Union pursuant to the written authorization. (Joint Ex. 26-C). Mr. Reeder testified that the Union opposed the proposal on the grounds that the dues checkoff is a contractual arrangement between the Union and the employee. (Tr. 102 at 1-2). Respondent offered no explanation for the proposal other than to say "they wanted the employee to be able to go to HR and get out of the union at any time." (Tr. 102 at 5-6). No further explanation was provided even though Respondent indicated that it understood the Union has a contract with the employee. (Tr. 102 at 8-14). Respondent refused to change its position. (Tr. 102 at 15-17). The Union did not agree to revisions to the dues checkoff provision. (Tr. 102 at 18-19).

Another one of the Respondent's proposals included in Joint Exhibit 26-C proposed removing the entire safety provision, which is Article 7 in the expired CBA. Mr. Reeder testified that Respondent stated it wanted to have sole responsibility for safety, without any further explanation. (Tr. 105 at 1-6). The Union offered a counter proposal which would retain the nine articles Respondent sought to remove entirely, with modifications set forth on Joint Ex. 26-D.

Another one of the Respondent's proposals included removing Article 17, the seniority article, in its entirety. Mr. Reeder testified that, like safety, seniority is "a primary concern for the union." (Tr. 112 at 24-25). Mr. Reeder explained, "Seniority is a basic principle of the union." (Tr. 114 at 8). He explained that it is necessary for vacation, job bidding, and other matters, and the Union wanted to know why seniority was a problem. Under Respondent's proposal, Respondent "would choose the more qualified one or just decide on who gets it. First come, first served basis or whoever's more qualified." (Tr. 113 at 19-21). The same would go with vacations. (Tr. 113 at 23-24). Respondent offered no explanation when asked for an explanation for its proposal to remove the seniority provision altogether. (Tr. 116 at 7-10). Respondent refused to change its position. (Tr. 116 at 19-21). The Union did not agree to revisions to the seniority article. (Tr. 116 at 22-23). Another one of Respondent's proposals include in Joint Ex. 26-C proposed removing Article 21, the plant visitation article, in its entirety. Respondent refused to change its position and the Union did not agree to the proposed removal. (Tr. 119 at 2-8).

During the next bargaining session, on November 18, 2019, the parties' further discussed the November 11th proposals. Eric Reeder, April Guerrero, Rodney Brejcha, and Carmen Perez were present for the Union. (Joint Ex. 33 § 20). Jerry Pigsley and Fischel Ziegelheim were present for Respondent. (Joint Ex. 33 § 20). Respondent offered a counter proposal to replace the safety provision, as opposed to simply removing it as proposed in Joint Exhibit 26-C. Respondent's proposal is set forth in Joint Exhibit 27-B. However, as Mr. Reeder testified, the replacement article "pretty much removes all role for the union to inspect the plant or to do any walkarounds or anything like that." (Tr. 106 at 23-25). The proposal would further eliminate any union representatives from the safety committee, whereas under the expired CBA there was union

representation on the committee. In other words, there was little difference between this proposal and the November 11th proposal with respect to the Union's role. (Tr. 107 at 21-23).

The Union's counter proposals are set forth in Joint Exhibit 27-C and Joint Exhibit 27-D. As Mr. Reeder testified, with respect to proposed modifications to the safety provisions, the Union "offered back to try to make the safety language in the contract more palatable. It took some of our role back a step." (Tr. 108 at 5-7; Joint Ex. 27-C). For example, among other things, the Union proposed quarterly walkarounds instead of monthly walkarounds, which was what the expired CBA provided. The Union's counter proposal on safety sought to maintain the existing language with modifications in order to compromise with Respondent. (Joint Ex. 26-C; Tr. 109 at 5-9). Despite numerous concessions offered by the Union, Respondent did not accept any of the Union's proposals. (Tr. 111 at 25; Tr. 112 at 1; Joint Ex. 27-C; Joint Ex. 27-D).

The next day, November 19, 2019, Mr. Pigsley e-mailed Mr. Zarate stating that Respondent needed to change the start time from 9:00 a.m. to 1:30 p.m. for the sessions scheduled for Thursday, November 21, 2019 and Tuesday, November 26, 2019. (Joint Ex. 16). When asked by the Union why these times would need to be changed since they were initially proposed by Respondent, Mr. Pigsley replied, "It works better for them to handle their business needs." (Joint Ex. 16). Mr. Zarate requested further specificity. (Joint Ex. 16).

The next day, November 20, 2019, Mr. Piglsey replied indicating that Respondent would be present the next day at 9:00 a.m. (rather than 1:30 p.m.) but would not be able to meet for future negotiations until no earlier than 2:00 p.m. (Joint Ex. 16). Mr. Zarate responded by asking whether there was any reason for the 2:00 p.m. limitation. (Joint Ex. 16). Mr. Zarate pointed out that the parties had historically began negotiations in the morning, which allowed sufficient time for the 6-hour negotiation sessions to conclude within normal business hours. (Joint Ex. 16). When again

asked for an explanation for the change in start times, Mr. Piglsey replied, "I do not understand why the Union is holding up approving moving the start time absent knowing specific details about my client's business needs . . . My client for future negotiations sessions after next week, on the days already agreed upon, will agree to meet with the Union any time after 2 p.m." (Joint Ex. 16). Respondent refused to provide any additional explanation.

The same day, November 20, 2019, Fischel Ziegelheim, who represented Respondent during the negotiations along with Mr. Pigsley, contacted Mr. Reeder directly and asked him to meet him at the Omaha airport. Mr. Reeder met Mr. Ziegelheim at the airport, and Michael Konig, the Respondent's owner, was present. (Tr. 124 at 7-9). During this meeting, Respondent, through Mr. Konig, affirmed its opposition to any arbitration clause. (Tr. 126 at 1-4). Respondent also requested to cancel the bargaining session for the next day, November 21st, so that Respondent could put together a proposal which would serve as a substitute for arbitration.[3] (Tr. 127 at 19-21). Mr. Reeder testified that he told Respondent that he would have to talk to the Union's attorney about cancelling the session. (Tr. 127 at 12-13). This is because scheduling of bargaining sessions was conducted through the parties' attorneys. (Tr. 140 at 6-9). There was a specific agreement that all scheduling, including cancellations and rescheduling of sessions, went through the parties' attorneys. (Tr. 140 at 19-23).

Later that day, Mr. Zarate e-mailed Mr. Pigsley, stating, in part, "I understand that the Company has directly communicated with the Union just now that the Company now wishes to cancel tomorrow's negotiation session altogether and reschedule." (Joint Ex. 17). Mr. Zarate indicated that the Union would be willing to agree to the request for a cancellation on a one time

[3] Respondent never provided the Union with any proposal concerning a substitute for arbitration procedure prior to unilateral implementation. (Tr. 138 at 16-20; Tr. 139 at 2-5).

basis provided that the Company agrees to reschedule for another date in November or December separate and apart from the other dates already agreed upon. (Joint Ex. 17). Mr. Zarate requested confirmation of agreement under those terms in writing as soon as possible. (Joint Ex. 17). Mr. Piglsey replied, stating only that it was his understanding that the meeting was already cancelled. (Joint Ex. 18). Mr. Zarate replied, stating that if Respondent did not agree to the additional terms set forth in the earlier e-mail then the request to cancel the session the next day would be denied and the session would begin at 9:00 a.m. as scheduled. (Joint Ex. 18). Mr. Pigsley did not reply and did not provide confirmation.

The next day, on November 21, 2019, no one from Respondent's negotiating team showed up for the scheduled session. (Tr. 130 at 1-5). Mr. Reeder testified, "[M]y understanding was that [the Union's attorney] reached out and had not heard anything back … we showed up…" (Tr. 130 at 3-8). Mr. Zarate e-mailed Mr. Pigsley requesting Respondent (1) explain its absence and provide the Union with dates and times to reschedule; and (2) again requesting a response regarding the 2:00 p.m. start time limitation Respondent was attempting to impose on all future negotiations. (Joint Ex. 18). Later that day, Mr. Zarate reminded Mr. Pigsley that all communications must go through the Union's counsel and asked that Respondent immediately cease and desist from contacting the Union's officers about Respondent's no-show. (Joint Ex. 18). Mr. Pigsley replied, stating that the Union President had told Mr. Ziegelheim the day before that the Union agreed to cancel the session. (Joint Ex. 18). Mr. Zarate replied, stating, in part:

> [T]he conversation that Mr. Ziegelheim requested to have with Union President Mr. Reeder last night at the airport about cancelling today's session all occurred *prior* to the emails that you and I exchanged last night on the subject. At the very least, the Company, through you, was aware last night that regardless of whatever Mr. Ziegelheim and Mr. Reeder had verbally discussed earlier at the airport, the Union had in fact not yet agreed to a cancellation and would not do so unless the Company agreed in writing to reschedule the cancelled session. Yet, despite being made aware in writing the night before that the Union had not agreed to the cancellation,

> the Company's negotiating team, including you, simply chose not to show up today—without any sort of notice to the Union either last night or this morning before the session was scheduled to begin. Your explanation would only make sense if you pretended that the emails you and I exchanged last night did not exist (which, if you scroll down, you will see that they do in fact exist, Jerry).
>
> (Joint Ex. 18)

The parties met again on November 26, 2019 at 9:00 a.m., as previously scheduled, and continued negotiations. Eric Reeder, April Guerrero, and Carmen Perez were present for the Union. (Joint Ex. 33 § 20). Jerry Pigsley was present for Respondent. (Joint Ex. 33 § 20). Joint Exhibit 28 is the bargaining summary created by Respondent following that session. During this session, Respondent presented new proposals identified as Joint Exhibit 28-B, Joint Exhibit 28-C, and Joint Exhibit 28-D. The Union also presented proposals as set forth in Joint Exhibit 26-E and counter proposal set forth in Joint Exhibit 26-F.

One of Respondent's proposals was to add a new article, "Waiver, Entire Agreement, and Severability." (Joint Ex. 28-D). This proposal, among other things, would effectively waive the Union's right to bargain over mandatory subjects of bargaining during the term of the agreement. The specific proposed language reads:

> Therefore, the Company and the Union, for the term of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject matter not referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

The Union offered a counter proposal to add language providing that the waiver is null and void with respect to any mandatory subjects of bargaining in accordance with federal labor law. (Joint Ex. 28-F). Respondent stated that it was not interested with no explanation. (Tr. 122 at 7-12). The Union did not agree to the proposed waiver language. (Tr. 122 at 13-18).

At this point in negotiations, there had not yet been any proposals or negotiations concerning economics. (Joint Ex. 26; Joint Ex. 27; Joint Ex. 28). At no point did the Company take the position that both economics and non-economics needed to be addressed or bargained simultaneously. (Tr. 133 at 15-19). At one point Respondent told the Union that it had already given the Union the information it needed on economics, but the information came on a flash drive containing approximately 900 pages of information. (Tr. 135 at 1-11). A summary of the information was not provided until December 10, 2019. (Tr. 135 at 17-20).

On November 27, 2019, Mr. Zarate once again requested from Mr. Pigsley a response regarding the 2:00 p.m. start time limitation Respondent was attempting to impose on all future negotiations. (Joint Ex. 19). On December 2, 2019, the Union and Respondent jointly requested a mediator to be present for the parties' scheduled December sessions, subject to the mediator's availability. (Joint Ex. 20-A). FMCS Commissioner Ron Morrison stated that he would be available for the December 9, December 10, and December 17 sessions. (Joint Ex. 21).

The parties met again on December 9, 2019, as previously scheduled. Eric Reeder, Rodney Brejcha, and Carmen Perez were present for the Union. (Joint Ex. 33 § 20). Jerry Pigsley and Samuel Prager were present for Respondent. (Joint Ex. 33 § 20). FMCS Commissioner Ron Morrison was also present. (Joint Ex. 33 § 20). Respondent's bargaining summary for this session is set forth in Joint Exhibit 29. Respondent's summary indicates that numerous proposals were still being considered and worked on by the parties. The summary also indicates that on this date the Union requested a copy of Respondent's rates of pay (Joint Ex. 29 at p. 2), and that Respondent was going to provide the Union with a copy of its pay sheet summary and would answer questions regarding current pay issues. (Joint Ex. 29 at p. 5).

The parties met again on December 10, 2019, as previously scheduled. Eric Reeder, Rodney Brejcha, and Carmen Perez were present for the Union. (Joint Ex. 33 § 20). Jerry Pigsley and Mary Junker were present for Respondent. (Joint Ex. 33 § 20). FMCS Commissioner Morrison was also present. (Joint Ex. 33 § 20). Respondent's bargaining summary for this session is set forth in Joint Exhibit 30. The summary indicates that Respondent provided the Union with a two-page handout setting forth pay rates which had been effective since August 23, 2018. This two-page handout is set forth in Joint Exhibit 30-B and is not characterized as a Company proposal. Mr. Reeder had not seen these documents prior to December 10th. Respondent did not present a wage proposal to the Union. (Tr. 158 at 19-21). All that was presented was the wage summary requested by the Union during the previous session. (Tr. 158 at 23-24). This was information the Union needed to build a wage proposal. (Tr. 136 at 8-13). It was provided to the Union as a response to the Union's request; it was not characterized by Respondent as a proposal. (Tr. 158 at 22-25; Tr. 159 at 1-2).

Union proposals and counters from this session are set forth in Joint Exhibit 30-C. The bargaining summary also refers to seven tentative agreements reached as set forth in Joint Exhibit 30-D. The tentative agreements included therein are signed by Respondent and the Union on the following issues: (1) name of company; (2) exclusion of shag drivers from unit; (3) non-discrimination language; (4) glassed in bulletin boards; (5) no changes to military service article; (6) new language in Article 15 but removing proposed waiver of contractual rights language; and (7) clarifying rest period language. (Joint Ex. 30-D).

The parties met again on December 17, 2019, as previously scheduled. Brian Schwisow and Carmen Perez were present for the Union. (Joint Ex. 33 § 20). Jerry Pigsley was present for Respondent. (Joint Ex. 33 § 20). Respondent's bargaining summary for this session is set forth in

Joint Exhibit 31. During this session the parties continued to discuss proposals and counter proposals. Unfortunately, Ms. Perez had to leave for a family medical emergency so the parties did not bargain for the entire six hours. (Joint Ex. 31; Tr. 77 at 14-15).

A bargaining session scheduled for December 30, 2019 was cancelled due to weather. (Joint Ex. 22). At that time, Commissioner Morrison indicated he would not be available for the January 13th session and provided alternative availability. The Union responded with additional January availability, but Respondent did not offer alternative dates to include the mediator. (Joint Ex. 22). On January 10, 2020, Mr. Pigsley e-mailed Mr. Zarate, stating

> **since the parties have not reached a complete collective-bargaining agreement or good faith impasse by the end of December 2019, Noah's Ark provides the Union and the Acting Regional Director of Region 14, the following eight dates during February 2020, eight dates during March 2020, and eight dates during April 2020, on which Noah's Ark representatives are available to bargain for no less than six hours on each date.**

(Joint Ex. 23-A) (emphasis added). The letter went on to provide the various dates.

The parties met again three days later on January 13, 2020, as previously scheduled. Rodney Brejcha was present for the Union. (Joint Ex. 33 § 20). Jerry Pigsley was present for Respondent. (Joint Ex. 33 § 20). Joint Exhibit 32 is the bargaining summary prepared by Respondent on January 20, 2020. (Tr. 167 at 1-8). Mr. Brejcha's notes from the meeting, which were taken contemporaneously, are set forth in G.C. Exhibit 5. Mr. Brejcha testified that "N/I" or "N/A" in the notes mean "no agreement" or "not interested". (Tr. 192 at 6-8). No change means the Union has no change on the Union's proposal. (Tr. 193 at 11-12).

The bargaining summary prepared by Respondent indicates that the Union agreed to Respondent's proposed bargaining dates in February and March. The summary also references an

off-the-record discussion.[4] The summary further suggests that there were tentative agreements which had been reached but not signed off on since Ms. Perez was not available that day to present the proposals. The only tentative agreement signed off on, however, is set forth in Joint Exhibit 32-B.

The summary also states that Respondent "supplemented its proposal on Rates of Pay" but the reality is that it was on this date that Respondent *presented* its proposal which would add "the starting rate of pay is $12.00 per hour" and reference the current pay rate schedule. This proposal presented, **for the very first time**, is set forth in Joint Exhibit 32-C. As of that session, January 13th, the parties had not yet bargained over economics (wages). (Tr. 136 at 14-18). As of that session, the Union had not put together a wage proposal; the Union had begun working on it based on the summary they recently received, but felt there was "room to negotiate in our non-economic stuff that we hadn't wrapped up yet." (Tr. 137 at 6-8).

Respondent's summary includes a list of items it asserts were tentatively agreed upon or still open between the parties which the parties allegedly discussed. Respondent's summary alleges various tentative agreements were acknowledged by the parties, but many of those alleged tentative agreements were not reduced to writing by the parties. (Tr. 165 at 21-24). To Mr. Brejcha's knowledge, no tentative agreements were reached at this meeting that were not reduced to writing. (Tr. 181 at 1-9). The one tentative agreement that was reached during this meeting and was signed off on, as set forth in Joint Exhibit 32-B, concerned underlined language about holidays under Article 7.

[4] Mr. Brejcha testified that he had an off-the-record conversion with Respondent's attorney, Mr. Pigsley, regarding the Union's previous proposal to streamline the grievance procedure. Mr. Brejcha "was trying to figure out if [he] would rewrite it or if [he] would resubmit it if [Respondent] would look at it or [] consider it or not." (Tr. 180 at 911). Mr. Pigsley, for Respondent, told Mr. Brejcha that Repsondent wasn't interested. (Tr. 180 at 12-15).

During the session, Respondent offered a proposal regarding Union Leave set forth in Joint Exhibit 32-D. According to Respondent's bargaining summary, Respondent later agreed during this meeting to the Union's proposal that the Union Leave time period be based on the calendar year rather than "any twelve-month period." (Joint Ex. 32). Respondent shortly thereafter called for a caucus at 1:10 p.m. (Joint Ex. 32). The parties returned at 2:25 p.m. Seven minutes later, at 2:32 p.m., Respondent presented its last, best and final offer to the Union as set forth in Joint Exhibit 32-E. The bargaining summary explains that on page 8 of the final offer there was a handwritten statement that incorporated the calendar year language with respect to Union Leave, and explains that the pay rate schedule was not attached to the final offer but that it was the same proposal presented to the Union that day. (Joint Ex. 32).[5] Respondent's bargaining summary asserts that the Union "then went through the Employer's final offer and stated that there would be no need for the parties to meet tomorrow." (Joint Ex. 32). Five minutes after providing the last, best and final offer, Respondent left negotiations. (G.C. 5 at p. 4).

Mr. Brejcha and Mr. Pigsley were the only parties present during the January 13, 2020 bargaining session when Respondent presented its last, best and final offer. (Tr. 183 at 9-15; Tr. 195 at 10-13; Joint Exhibit 32-A). Only Mr. Brejcha provided sworn testimony during the hearing about what occurred that day. Mr. Brejcha testified that after receiving the final offer he told Mr. Pigsley he would go over it with Mr. Reeder and the Union's attorney since it was represented as their final offer. (Tr. 184 at 9-12). Mr. Brejcha also testified that he asked Mr. Pigsley if the bargaining session would resume the next day, as scheduled, and that Mr. Pigsley responded by

[5] Based on the short breaks taken during the session, as well as the handwritten notes and absence of the calendar-year change on the proposal, Mr. Brejcha's testimony was that he believed the last, best and final offer proposal was already prepared and brought to negotiations that morning, "with the whole intention of wasting [the] day." (Tr. 196 at 1-9).

saying Respondent did not want to negotiate anymore and there was no reason to continue talking. (Tr. 184 at 14-22). This is further corroborated by Mr. Brejcha's notes from the meeting. (G.C. 5 at p. 4). The Union never indicated that the Union did not want to meet for future negotiations. (Tr. 188 at 1-4).

Respondent did not show up to bargain the next day. (Tr. 198 at 2). Respondent has not agreed to return to the table since presenting the last, best and final offer. (Tr. 198 at 3-6).

The next day, on January 14, 2020, Mr. Zarate e-mailed Mr. Pigsley letting him know that he was made aware by the Union that Respondent provided the Union its last, best and final offer and that Respondent had cancelled all future negotiations, including the session scheduled for that day, January 14th. Mr. Zarate stated, "Understand that the Union remains ready and available to engage in additional bargaining, including today. The Union further believes that the Company's cancellation of all future negotiations is premature and, as such, further evidence of bad faith bargaining." Mr. Zarate continued, "The Union was provided with no opportunity to review and ask questions relating to the Company's latest best and final offer. Furthermore, the parties have also yet to engage in previously agreed upon mediation scheduled for January 23rd." (Joint Ex. 24). Mr. Zarate concluded, "I urge the Company to reconsider its refusal to engage in additional bargaining." (Joint Ex. 24).

Mr. Pigsley replied on the same day, stating that it was his understanding that the Union had nothing to discuss with respect to Respondent's final offer. (Joint Ex. 24). Mr. Zarate replied stating that there must have been a miscommunication regarding that, and told Mr. Pigsley that the Union certainly wanted to continue negotiations immediately. (Joint Ex. 24). Mr. Zarate reiterated the Union's request to discuss the last offer as well as to engage in the agreed upon mediation session for January 23rd. (Joint Ex. 24). Mr. Zarate further asked for clarification as to whether

Respondent is willing to resume negotiations; whether Respondent is willing to participate in the mediation; and asked for an explanation as to why Respondent provided a final offer despite having agreed to mediate on January 23rd. (Joint Ex. 24).

Receiving no reply, Mr. Zarate e-mailed Mr. Pigsley again on January 16, 2020 seeking a response. Mr. Pigsley responded, stating that he had let the mediator know that Respondent was waiting to hear back from the Union as to whether it had accepted its final offer and told the mediator that if the Union decided not to accept the final offer then Respondent would consider negotiations to be at impasse. (Joint Ex. 24). Mr. Zarate replied, stating, in part, that he understands Mr. Pigsley' s email to mean (1) Respondent cancelled the mediation session despite having just agreed on January 7th to engage in the mediation; (2) Respondent is no longer willing to engage in the mediation; (3) Respondent is not willing to provide any rationale for its decision to provide a final offer on January 13th despite the pending mediation, although such explanation was requested; and (4) Respondent is no longer to meet with the Union for any additional discussions, even discussions concerning the January 13th proposal, despite the Union's express request for such additional discussions. (Joint Ex. 24).

Later on January 16, 2020, Mr. Zarate e-mailed Mr. Pigsley telling him that he received the Union's notes from the January 13th session. (Joint Ex. 24). Mr. Zarate wrote that it was his understanding that during prior bargaining sessions, including those on December 10th and December 17th, the parties had discussed deferring negotiations over rates of pay and other economic mandatory subjects of bargaining to a later point once bargaining over non-economic terms had been completed. Mr. Zarate further stated that as of January 13th bargaining over those economic mandatory subjects of bargaining had not yet occurred. Mr. Zarate pointed out that given the Company's issuance of a final offer on January 13th and apparent refusal to meet with

the Union for any additional sessions, even sessions to discuss the final officer, Mr. Zarate's understanding was that Respondent therefore had no intention of bargaining with the Union over the economic mandatory subjects of bargaining. Mr. Zarate asked that Mr. Pigsley advise him if this understanding is incorrect. (Joint Ex. 24). Mr. Zarate also made Mr. Pigsley aware that he had spoken to the mediator who informed Mr. Zarate that Mr. Pigsley had cancelled the January 23rd mediation session. (Joint Ex. 24). No response was received.

On January 24, 2020, Respondent notified the Union via letter that it was declaring impasse and implementing its January 13th last, best and final offer. (Joint Ex. 25; Joint Ex. 33 § 22). In the correspondence, Respondent asserted, in part:

> It is clear that the Company and the Union have reached a point during the collective bargaining process where both parties can assume that further negotiations would be pointless. The parties have made it clear that they remain firm on issues of importance to them and refuse to accept anything other than their position. Accordingly, the Company declares an impasse has been reached in collective bargaining negotiations with the Union.
>
> (Joint Ex. 25)

V. ARGUMENT

Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment…but such obligation does not compel either party to agree to a proposal or require the making of a concession." That being said, the obligation or duty to bargain in good faith requires more than just going through the motions; it requires that parties approach bargaining with a "serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Truitt Mfg*, 351 U.S. 149, 155 (1956). *See also Endo Laboratories, Inc*., 239 NLRB 1074, 1075 (1978) (recognizing the "the kind of 'horsetrading' or 'give-and-take' that

characterizes good-faith bargaining"). "[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), *enfd. sub nom*. 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co*., 344 F.2d 210 (8th Cir. 1965)).

In determining whether a party has bargained in good faith, the Board looks to the totality of the circumstances in which the bargaining took place. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Further, the Board looks not only at the parties' behavior at the bargaining table, but also to their conduct away from the table as bearing on a party's good faith while engaged in bargaining. *Port Plastics*, 279 NLRB 362 (1986). Indicia of bad faith includes conduct such as delay tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, regressive bargaining, withdrawal of already agreed-upon provisions, and arbitrarily scheduling/cancelling bargaining sessions. *Atlanta Hilton & Tower*, 271 NLRB at 1603.

It is also well-known that "[u]nilateral changes are a per se breach of the Section 8(a)(5) duty to bargain, without regard to the employer's subjective bad faith. *Covanta Energy Corp.*, 356 NLRB 706, 719 (2011). "[A]n employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in a term or condition of employment involving a mandatory subject of bargaining without first bargaining to an impasse." *Finch, Pruyn & Co., Inc.*, 349 NLRB 270, 277 (2007); *NLRB v. Katz*, 369 U.S. 736 (1962).

a. Respondent Violated the Act by Failing to Bargain in Good Faith

"Whether Respondent approached its bargaining obligation with a disposition of give and take implicit in the concept of collective bargaining or whether it went to the table merely to lend a patina of respectability to its ultimate purpose of frustrating serious negotiations requires a

review of Respondent's activities from the beginning of the bargaining relationship." *Crane Co.*, 244 NLRB 103, 114 (1979) (holding that by following a long-term collective-bargaining strategy designed to avoid entering into a contract, Respondent violated Section 8(a)(5) of the Act). Here, the Board has already found that Respondent has failed to bargain in good faith during earlier periods of the negotiations by failing to provide the Union with presumptively relevant information, delaying or cancelling bargaining sessions, failing to provide counterproposals, failing to provide explanations for Respondent's rejection of the Union's counterproposals, and so on. (Joint Ex. 7). This background, which was also provided in part during the hearing in this matter, is relevant because it is obvious that Respondent, despite the multiple orders from the Board and courts directing Respondent to bargain in good faith, still has no interest in doing so. Respondent's conduct, including its specific proposals and unilateral implementation, track the same pattern demonstrated during earlier periods of bargaining which the Board found similarly violative of the Act. Certainly the Union in this matter would have preferred not to return to the Board again, and certainly the Union hoped that the Respondent would have learned from the previous outcome, but the instant proceeding was made necessary because Respondent has refused to change its behavior.

A bargaining party does not demonstrate good faith by simply showing up to negotiation sessions a number of times or reaching a certain number of agreements on subjects with which there were never any differences. The parties met seven times between November 11, 2019 and January 13, 2020. These sessions were not attended voluntary, but rather, pursuant to a Contempt Order issued by a federal court. Throughout the 10(b) period, Respondent demonstrated a complete lack of good faith as evidenced by Respondent's failure to timely respond to reasonable requests for information related to bargaining; Respondent's rescheduling and cancellation of bargaining

sessions without notice or agreement; Respondent's refusal to explain its justifications for its bargaining positions as well as scheduling positions; Respondent's regressive bargaining; Respondent's submission of proposals which would effectively remove the Union as bargaining representative; and Respondent's failure to bargain over mandatory subjects of bargaining.

The lack of exchange of proposals or counterproposals is a factor the Board considers in determining whether a party is bargaining in good faith. *See generally Mid-Continent Concrete*, supra at 260; *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1042 (1996), *enfd.* 140 F.3d 169 (2nd Cir. 1998); *MRA Associates, Inc*., 245 NLRB 676, 677 (1979). As Judge Gollin observed in Case 14-CA-217400:

> Respondent failed to submit counterproposals and provide explanations for its rejection of the Union's counterproposals. … Respondent made two proposals--its initial May 15 proposal and its January 2 last, best, and final proposal--which are virtually identical. The Union submitted 8 proposals or counterproposals. The Union made multiple offers to withdraw or modify its proposals in exchange for Respondent doing the same. However, Respondent summarily rejected those proposals, without explanation. It never offered to modify or eliminate any of its own proposals to reach a compromise. A party demonstrates an overall lack of good faith when, as here, it does not budge from its initial bargaining position(s), fails to explain its positions, and refuses to make any effort to compromise to reach common ground on key issues. *Altofer Machinery Co*., supra at 150; *John Asuaga's Nugget*, 298 NLRB 524, 527 (1990), enfd. in pertinent part 968 F.2d 991 (9th Cir. 1992). See also *Mid-Continent Concrete*, supra.

(Joint Ex. 7). Respondent similarly engaged in identical conduct in the instant case. Here, Respondent's January 13, 2020 last, best and final offer (Joint Ex. 32-E) is largely identical to the November 11, 2019 proposal (Joint Ex. 26-C) which began the third period of bargaining. Respondent showed no willingness to compromise on any of the key issues. Respondent also provided insufficient explanations for its summary rejection of most of the Union's proposals and counter proposals, despite the Union's demonstrated efforts to make meaningful, substantive concessions. Respondent never explained to the Union the importance of the changes it was

proposing, or why it summarily rejected the Union's quid pro quo proposals addressing those topics, without explanation or a counterproposal. If a party is unwilling to make any meaningful modifications to its proposals, it is in effect maintaining an impermissible "take it or leave it" approach to bargaining. *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 485 (1960). As such, there must be a similar finding here that Respondent has violated the Act by not budging at all from initial bargaining positions and refusing to make any effort to compromise on key issues.

Respondent also demonstrated bad faith away from the table. For example, Respondent demanded that the parties "meet for negotiations no earlier than 2 p.m." for future negotiations in a November 20, 2019 e-mail from Respondent's attorney to the Union's attorney. (Joint Ex. 16). The Union requested on numerous occasions for an explanation as to why the times would need to be moved to so late in the day given that the parties had always started bargaining in the morning, but the Respondent, through its attorney, provided no response other than it would work better for the Respondent's "business needs." (Joint Ex. 16.). It is well established that an employer has a statutory duty to make its authorized representative available for negotiations at reasonable times and places. *Crane Co.*, 244 NLRB 103, 111 (1979). The fact that a Respondent or its designated negotiators are so busy that they cannot get around to meeting promptly with union negotiators is no defense. *Insulating Fabricators, Inc., Southern Division*, 144 NLRB 1325 (1963); *Franklin Equipment Company, Inc.*, 194 NLRB 643 (1971). Here, the Respondent also attempted to cancel a negotiating session just one day before the scheduled session and failed to appear at sessions that were not cancelled. In addition, Respondent requested one of the Union representatives, without informing the Union's counsel, meet at the Omaha airport one evening only for the Union representative to be interrogated by the Respondent's owner about the Union's position on

arbitration. Such conduct evidences bad faith and illustrates the extent to which Respondent will go to avoid its obligations to bargain meaningfully with the Union.

Respondent's bad faith is showcased further by its commitment to clearly erroneous positions during bargaining. Respondent stated in its bargaining summary in Joint Exhibit 28, for example, that "it does not accept arbitration because it cannot get arbitrators assigned from Nebraska or adjoining states." This is plainly not true as the Union repeatedly informed Respondent that FMCS panel requests could be tailored to specific states. Moreover, in Respondent's January 24, 2020 letter declaring impasse, Respondent states that Respondent received no communication from the Union about Respondent's final offer, making no mention of its refusal to respond to the Union's requests to resume bargaining. The letter also incorrectly states that "[t]he parties have made it clear that they remain firm on issues of importance to them and refuse to accept anything other than their position." This is plainly not supported by the testimony or documents in this matter with respect to a number of the outstanding proposals. Rather, it is an attempt by Respondent to create a reality on paper that did not exist.

b. Respondent Violated the Act by Engaging in Regressive Bargaining

Engaging in regressive bargaining and withdrawing concessions previously granted constitute indicia of bad faith. *Suffield Acad*., 336 NLRB 659 (2001) (stating a withdrawal of previously agreed upon proposals will be considered evidence of a lack of good-faith bargaining unless the employer demonstrates that it had good cause for the withdrawal); *Transit Serv. Corp*., 312 NLRB 477 (1993).

To begin, Respondent's November 11th proposal (Joint Exhibit 26-C) is markedly worse than Respondent's August 6, 2019 last, best and final offer (Joint Exhibit 14), which itself was worse than Respondent's January 2, 2019 final offer. For example, Joint Exhibit 14 proposed no

changes to Article 1, Recognition, while the later proposal in Joint Exhibit 26-C proposed removing maintenance employees and shag drivers from the bargaining unit. Joint Exhibit 14 proposed removing the rates of pay, subcontracting and extra work articles entirely, while Joint Exhibit 26-C proposed replacing those articles with management's rights clauses with respect to those items. Joint Exhibit 14 did not modify the Union Leave provision in Article 20, while Joint Exhibit 26-C proposed to eliminate it entirely. Joint Exhibit 14 proposed removing some provisions of Article 21, Plant Visitation, while Joint Exhibit 26-C proposed eliminating it entirely, including orientation provisions, while also expanding management's rights. Joint Exhibit 14 proposed no change to Article 23 ("Work in excess of twelve (12) hours a day will be on a voluntary basis except for maintenance in emergency situations."), while Joint Exhibit 26-C proposed to eliminate it entirely and expand management's rights to include assigning work in excess of 12 hours a day.

Respondent continued to engage in regressive bargaining even after its regressive November 11th proposal was offered. Respondent's November 11th proposal included language that would eviscerate the Union's right to bargain of pay increases, a mandatory subject of bargaining. (Joint Ex. 26-C). Specifically, Respondent proposed changing Article 12, the Rates of Pay provision, to include, "Union recognizes management's right to increase pay without the agreement of the Union." However, on November 26th, Respondent submitted a new proposal to add language that would effectively waive the Union's right to bargain over any other mandatory subjects of bargaining during the term of the agreement. (Joint Ex. 28-D). The specific proposed language provided that

> the Company and the Union, for the term of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject matter not referred to or covered

> in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.
>
> (Joint Ex. 28-D)

The Union offered a counter proposal to add language providing that the waiver is null and void with respect to any mandatory subjects of bargaining in accordance with federal labor law. (Joint Ex. 28-F). Respondent stated that it was not interested in the Union's counter with no further explanation. As another example of regressive bargaining, Respondent offered a counter proposal to the Union regarding safety (Joint Exhibit 27-B) after the Union opposed Respondent's initial proposal to remove the safety article entirely. However, as Mr. Reeder testified, the proposed replacement article simply put into words what the consequence would be of Respondent's initial proposal: "pretty much remov[ing] all role for the union…" (Tr. 106 at 24). The proposal would further eliminate any union representatives from the safety committee. In other words, the "counter proposal" was no counter at all. Review of the proposals exchanged and Respondent's last, best and final offer confirm that Respondent consistently refused to do anything more than go through the motions and often engaged in regressive bargaining. Respondent exhibited no "serious intent to adjust differences…to reach an acceptable common ground." *Truitt Mfg*, 351 U.S. at 155.

c. Respondent Violated the Act by Making Predictably Unacceptable Proposals

Engaging in "surface bargaining" is also indicia of bad faith. *Frankl v. HTH Corp*., 693 F.3d 1051 (9th Cir. 2012) (rejecting the defendant's argument that employer engaged in "hard bargaining, not bad faith bargaining" when it made demands that excluded the union from any meaningful representational role); *Mid Continent Concrete*, 336 NLRB 258 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002); *U.S. Ecology Corp.*, 331 NLRB 223 (2000). A lack of good faith may be found when employer proposals require the union to cede substantially all of its representational

function and are put forward as a price for any collective bargaining agreement. *Public Service Co. of Oklahoma v. NLRB*, 318 F.3d 1173 (10th Cir. 2003), *Clarke Manufacturing, Inc. and United Steel Paper and Forestry Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union*, 352 NLRB 141 (2008). Similarly, an employer's proposals offered without any reasonable expectation that they will be accepted by the union are evidence of surface bargaining. *Yearbook House*, 223 NLRB 1456 (1976); *NLRB v. A-1 King Size Sandwiches*, Inc., 732 F.2d 872 (11th Cir. 1984).

Here, several of Respondent's proposals would effectively remove the Union as bargaining representative. Overall, the effect would be to eliminate a number of employee protections as well as to undermine the union's ability to represent unit employees. *See Tomco Communications*, 220 NLRB 636 (1975), *enf. denied* 567 F.2d 871 (9th Cir. 1978) (an employer's "[r]igid adherence to proposals which are predictably unacceptable to the union may indicate a predetermination not to reach an agreement, or a desire to produce a stalemate in order to frustrate bargaining and undermine the statutory representative.").

The Board has found bad faith bargaining based on the employer's insistence on unilateral control over key terms and conditions of employment. In *San Isabel Electric Services*, 225 NLRB 1073 (1976), the Board found bad-faith bargaining based on the employer's insistence on unilateral discretion to determine safety and work rules, and on a provision whereby the arbitrator under the grievance process could not substitute his discretion for that of the employer. In finding a Section 8(a)(5) violation, the Board stated that the employer's proposals would insure that its unilateral decisions as to appropriate work and safety rules would be "final," because there could be no meaningful arbitration regarding those decisions. Thus, the proposals "would strip the union of

any effective method of representing its members" and "exclud[e] the union from any participation in decisions affecting important conditions of employment." *Id.* at 1080.

In *Harrah's Marina Hotel and Casino*, 296 NLRB 1116 (1989), the Board upheld the ALJ's decision that, in the totality of the circumstances, the employer's insistence on complete unilateral control over wages and benefits, without any recourse to the grievance and arbitration procedure or other dispute resolution process, constituted bad faith bargaining. The proposal specified that the employer could unilaterally change or discontinue any benefit during the term of the contract. The ALJ concluded that the employer's wage and benefits proposals evidenced bad faith because "[t]he Respondent's wage proposal was an attempt to retain unilateral control over all aspects of wages and thus effectively removed wages as a negotiable issue not only at the bargaining table but also for the term of any bargaining agreement." *Id.* at 1133. The ALJ concluded that the employees would be better off without a contract because the Act itself precludes unilateral action of the sort which the employer demanded. *Id.* at 1134.

Here, Respondent similarly insisted on similar proposals despite knowing that they were unacceptable, including proposals which would reduce the grievance procedure to nullity and abrogate the Union's right to bargain not just over wages, but all mandatory subjects of bargaining.

d. Respondent Violated the Act by Unilaterally Implementing Terms and Conditions Without Reaching Valid Impasse

"[A]n employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in a term or condition of employment involving a mandatory subject of bargaining without first bargaining to an impasse." *Finch, Pruyn & Co., Inc.*, 349 NLRB 270, 277 (2007); *see also NLRB v. Katz*, 369 U.S. 736 (1962); *Transp. Servs. of St. John, Inc.*, 369 NLRB No. 15 (2020). To determine whether a good-faith impasse has been reached, the Board considers the totality of the circumstances, including "[t]he bargaining history, the good faith of the parties in negotiations, the

length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Stein Industries, Inc.*, 365 NLRB No. 31, slip op. at 3 (2017). Impasse is that point in time in negotiations where the "parties have discussed the subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973), *enf. denied on other grounds* 500 F.2d 181 (5th Cir. 1974). The parties must both "believe they are at the end of their rope." *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 12 (2016) (quoting *Larsdale, Inc*., 310 NLRB 1317, 1318 (1993)).

Judge Gollin, in Case 14-CA-217400, held that this Respondent violated the Act when Respondent declared impasse and implemented its last, best and final proposal on January 30, 2019. Not even one year later, in the instant matter, Respondent similarly violated the Act on January 24, 2020 by declaring impasse and implementing its last, best, and final proposal and unilaterally changing mandatory subjects of bargaining, including wages, grievance procedures, safety provisions, holidays and vacation, union access, and the term of the agreement, without first bargaining with the Union to an overall good-faith impasse for a successor agreement. In fact, Respondent unilaterally implemented terms that would bar the Union from bargaining over any mandatory subjects of bargaining altogether. Judge Gollin observed:

> Respondent contends the parties met for negotiations approximately 20 times over 7.5 months, and while they were able to reach minor tentative agreements—changing the employer's legal name, updating the anti-discrimination language, and moving existing language about benefit eligibility from one article to another—they were unable to come to an agreement on any of the important issues. Additionally, Respondent contends after it gave the Union its last, best, and final offer, the Union failed to accept, reject, or present any counter, and, therefore, as of January 30, 2019, the parties had a contemporaneous understanding about the state of negotiations, which was they were both "at the end of their rope." (R. Br. 26). **I reject these contentions.**

(Joint Ex. 7) (emphasis added)

Respondent will likely make the same arguments in the instant proceeding, which must likewise be rejected. Although the parties met multiple times over several months, little of that time was productive due to Respondent's bad faith conduct. See *Fallbrook Hospital*, 360 NLRB 644, 651 (2014) (citing to *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952) (quantity or length of bargaining sessions does not necessarily equate with good-faith bargaining; must look at the substance and approach of the parties). Respondent continued to hold firm to the same unpalatable proposals and summarily rejected the Union's counterproposals without explanation. Indeed, an employer that causes a breakdown in negotiations by bad faith bargaining cannot then take advantage of the results of this violation to impose a unilateral change. *Carey Salt Co. v. N.L.R.B*., 736 F.3d 405 (5th Cir. 2013) (finding employer acted in bad faith, leading up to its impasse declaration, by deploying an impasse not to "further," but to "destroy" the negotiation, at a critical point when the parties had explicitly agreed to return to the table, and then rushed to unilateral implementation of a change in the terms and conditions of employment and refused to bargain further, despite the union's stated expectation of continuing talks.)

The record does not reflect that the parties were deadlocked. In fact, it was the Union's understanding that there was much more to be discussed as the parties had not even bargained over wages or economic terms. The Union had only recently obtained the wage information it requested from Respondent and was reviewing it in an effort to put together a wage proposal. By the time Respondent offered its described last, best and final offer on January 13, 2020, the parties had not bargained over wages at all. In fact, Respondent had only submitted its first proposal on wages that same day. In *Coastal Cargo Co.,* 348 NLRB 664 (2006), the Board affirmed an administrative law judge's determination that another employer violated § 8(a)(1) and (5) when it implemented

its last contract proposal and the parties had not actually reached a good-faith impasse in negotiations. The Board relied particularly on the fact that the parties did not have an adequate opportunity to discuss the economic proposals at future meetings because the employer presented its final offer before they had an opportunity to do so.

The same applies to the present case. As a result, the Union was in no position to accept, reject, or counter the last, best, and final offer, which included Respondent's first and only wage proposal. Similarly, there is no basis from which to conclude the parties both understood they were deadlocked or at the end of their ropes. The Union never advised Respondent as to which, if any, of its proposals it would be unwilling to further modify or eliminate, or which of Respondent's proposals it would adamantly refuse to accept. The bottom line is the parties never got that far in their negotiations.

VI. CONCLUSION AND REMEDY

The Union understands that Respondent cannot be compelled to agree to certain terms or any particular substantive bargaining position. However, the Act makes very clear that good faith is not satisfied by a bargaining party who merely goes through the motions without actually seeking to adjust differences with the other party, in this case, the Union. Here, Respondent did nothing but stand firm with respect to its unpalatable proposals, while claiming compromise on matters for which there were no differences. Moreover, Respondent implemented its final offer without the presence of a valid, good faith impasse. The parties had not even negotiated over wages before Respondent declared a stand-still. As the Union's uncontroverted testimony confirmed, the Union was never under the impression that the parties were at impasse, as the Union was still offering to make modifications to its own proposals, had not yet made a proposal over economics, and was expecting mediation to occur on January 23, 2020.

The absence of a valid, good faith impasse is perhaps best demonstrated by the fact that Respondent recognized, in writing, that the parties were not at impasse just one week before presenting its last, final and best offer. On that same day, January 7, 2020, Respondent proposed additional dates for bargaining sessions to occur in February, March, and April, and also agreed to mediation to occur on January 23, 2020. However, six days later, at the first bargaining session of the new year and without ever bargaining over economics, Respondent showed up to negotiations with yet another last, best and final offer and presented it to the Union. Eleven days after that, on January 24, 2020, the Respondent notified the Union that it was declaring impasse and implementing the final offer.

On the basis of the foregoing and the record as a whole, the Union respectfully submits that the record evidence and the law establish that Respondent violated Sections 8(a)(5) and (1) of the National Labor Relations Act, as alleged. Accordingly, the Union requests that the remedies sought in the General Counsel's complaint in this matter be ordered along with any other relief as may be just and proper.

Dated: February 12, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2021, a true and correct copy of the above was e-filed with the Region and served by e-filing and/or electronic mail and/or regular mail upon the following:

E-Filing
The Honorable Robert Ringler
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Administrative Law Judge

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